Supreme Court, U.S.
FILED
JUL 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-764

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF FLORIDA,
Petitioner,

vs.

MICHAEL A. RILEY,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, ACLU OF FLORIDA AND ACLU OF SOUTHERN CALIFORNIA IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1/]

The American Civil Liberties Union Foundation is a nationwide, nonpartisan organization of over 250,000 members dedicated to advancing fundamental constitutional rights.

The Florida affiliate of the ACLU has a specific interest in this case which arose within its jurisdiction.

The Southern California affiliate of the ACLU, located in Los Angeles, represents the interests of members in the southern part of this State. The Southern California affiliate has a particular interest in this case because police deployment of routine helicopter

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1/ Pursuant to Rule 36.2 of the Rules of this Court the parties' letters of consent to the filing of this brief were filed by counsel for respondent with the Clerk of this Court on April 29, 1988.

patrols over the suburban houses and yards that primarily comprise the Southern California geographic area poses a specific threat to privacy.

Moreover, amici are committed to the preservation of the home as a place where any person can reasonably expect to be free from government surveillance and in the protection of that freedom from infringement by ever increasing advancements in technology.

SUMMARY OF ARGUMENT

The clear language of the Fourth Amendment imbues the family home with heightened privacy protections that extend to the boundaries of its curtilage. This heightened protection requires that governmental conduct deemed acceptable in some other public locale, such as open fields, must be subjected to

much closer scrutiny when the privacy of the home is at stake.

When police, without first securing a warrant, position a helicopter over a home and residential yard so as to peer into the interior of an appurtenant structure, they contravene the privacy that all Americans reasonably expect. Surely Americans need not block out windows or retreat into basements so as to manifest subjective privacy expectations that society would recognize as objectively reasonable. Yet the "bright line rule" that the State of Florida champions would permit this most intrusive sort of helicopter surveillance, subject only to the caveat that federal aviation safety regulations not be violated. This use of a helicopter is a type of surveillance

that collides with Fourth Amendment protections, not simply because the aircraft makes an unreasonable noise, kicks up dust, or in some other manner physically disturbs the peace and quietude of the home dweller, but because the manner of its use exceeds societal expectations and violates the integrity of the home.

ARGUMENT

I.

A GREENHOUSE, TEN TO TWENTY FEET BEHIND A RESIDENCE, IS WITHIN THE CURTILAGE OF THE HOME AND AS SUCH IS PRESUMPTIVELY A PLACE THAT RESIDENTS CAN REASONABLY EXPECT TO BE PRIVATE

The Fourth Amendment, as it applies to the States through the Fourteenth Amendment, prohibits unreasonable searches of persons, their houses and their papers and effects. "The Fourth

Amendment protects against governmental intrusion upon 'the sanctity of a man's home and the privacies of life.' Boyd v. United States, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886)." Lewis v. United States, 385 U.S. 206, 213 (1966). Freedom from surveillance, especially in a person's living quarters, is a central tenet of the Fourth Amendment of grave concern to a society "which chooses to dwell in reasonable security." Johnson v. United States, 333 U.S. 10, 14 (1948). This Court has long acknowledged that the right to retreat into one's own home and there be free from unreasonable governmental intrusion is at the very core of Fourth Amendment protections. Silverman v. United States, 365 U.S. 505, 510 (1961). The language of the Fourth Amendment itself gives sanction to the

concept, central to our legal and cultural understanding, that the home is the paragon situs of privacy.

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when—bounded by the unambiguous physical dimensions of an individual's home--a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure—in their . . . houses . . . shall not be violated.'

Payton v. New York, 445 U.S. 573, 589 (1980); see also New York v. Burger, ___ U.S. ___, 107 S.Ct. 2636, 2642 (1987) (differentiating those privacy expectations society is prepared to recognize in a home from the lesser expectations attendant to a business enterprise). This special status afforded the home under the Fourth Amendment has been affirmed by this Court

as early as Boyd v. United States, 116 U.S. at 630 and as recently as California v. Greenwood, ___ U.S. ___, 108 S.Ct. 1625 (1988).

The heightened Fourth Amendment protection does not stop at the exterior walls of the house but extends to the boundaries of the curtilage, and includes in its scope those outbuildings situated within the area of the curtilage. California v. Ciraolo, 476 U.S. 207, 212-213 (1986); Wattenburg v. United States, 388 F.2d 853, 857 (9th Cir. 1968) ("The protection afforded by the Fourth Amendment, insofar as houses are concerned, has never been restricted to the interior of the house, but has extended to open areas immediately adjacent thereto.")

> The curtilage area immediately surrounding a private house has long been given protection as a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept.

Dow Chemical Co. v. United States, 476 U.S. 227, 235 (1986); see also United States v. Dunn, ___ U.S. ___, 107 S.Ct. 1134, 1139 (1987); Oliver v. United States, 466 U.S. 170, 180 (1984); Hester v. United States, 265 U.S. 57, 59 (1924). Indeed, "[t]he curtilage . . . has been considered part of the house itself for Fourth Amendment purposes." Oliver v. United States, 446 U.S. at 180.

Curtilage is that "space necessary and convenient, habitually used for family purposes and carrying on of domestic employment: the yard, garden, or field which is near to and used in connection with the dwelling." Wellford

v. Commonwealth of Virginia, 227 Va. 297, 315 S.E.2d 235, 238 (1984). Thus, curtilage at least includes the area that Americans would recognize instantly in suburban terms as the "yard" and at a minimum must accommodate sufficient space to allow a householder to go about his or her daily routine--hang out laundry, walk to the car, tend a flower bed, sit in the sun or engage in similar homely pursuits.

Certainly the suggestion that the curtilage of a dwelling on rural acreage should extend fewer than ten to twenty feet from the house would deprive curtilage of all meaning. For that reason, Michael Riley's greenhouse situated that distance from his trailer home was surely within its curtilage, and as such, entitled to its privacy

protections. Oliver v. United States, 466 U.S. at 180; Dow Chemical Co. v. United States, 476 U.S. at 235-236.

Amici are aware that this Court recently articulated factors useful in determining whether an area or outbuilding was so intimately tied to the family home "that it should be placed under the home's 'umbrella' of Fourth Amendment protection." United States v. Dunn, 107 S.Ct. at 1139. Those factors were (1) the proximity of the area to the home; (2) whether the area was included within an enclosure surrounding the home; (3) the nature of use to which the area was put; and (4) the steps taken to protect the area from observation by people passing by. Id. Acknowledging that these factors established neither a formula for mechanical application in

every situation nor one that would always yield a correct answer, this Court found them useful tools to analyze whether the ground level approach to a barn situated some 50 yards beyond the fence surrounding a ranch house violated privacy interests that the rancher had in his home and in those appurtenant structures within its curtilage.

It is highly uncertain whether the Dunn factors were meant to apply to a structure only 10 to 20 feet from the house, and thus clearly within its curtilage by any reasonable definition. Even applying the Dunn factors, however, there is no question that Riley's greenhouse was within the curtilage of his home: it was immediately adjacent to the trailer in which Riley lived (10 to 20 feet away); included within a fence

that at least partially enclosed both structures (Deputy Sheriff Kurt Gell testified that the greenhouse was within the area enclosed by the fence and the trial court included this in its findings); and Riley clearly took sufficient means to protect its interior from the observation of people passing by (the interior of the greenhouse was protected by opaque walls on two sides and obscured by shrubbery or by the trailer on the others). Thus three of the Dunn factors are present.

The remaining factor, the nature of uses to which the area is put, may be of assistance in delineating whether a structure some distance from a dwelling house is so closely associated with domestic activities that the curtilage must extend that far, but cannot be

relevant when the area in question is immediately outside the house. Since definitionally curtilage is the area that surrounds a dwelling house, it is "land," not "buildings." Thus the extent of ground included within a home's protected status might be determined by reference to use, but that factor alone provides no basis for excluding a structure, such as Riley's greenhouse, right next to a dwelling, from the protection of the curtilage area that clearly underlies it. Accordingly the suggestion, advanced both by petitioner and by amicus Airborne Law Enforcement Association, Inc., that Riley's greenhouse was used for commercial agricultural purposes and thereby precluded from enjoying the privacy protections of the home, is entirely misconceived.

Recognizing the heightened Fourth Amendment protection enjoyed within the curtilage, this Court frequently has drawn distinctions between that area and less protected open fields. Hester v. United States, 265 U.S. at 59; Oliver v. United States, 466 U.S. at 180; United States v. Dunn, 107 S.Ct. at 1139; Dow Chemical Co. v. United States, 476 U.S. at 235-36. Thus in Oliver, government trespass on private land to find marijuana growing in secluded areas distant from the home and curtilage did not offend the Fourth Amendment. This Court recognized that "the common law distinguished 'open fields' from the 'curtilage'" and that the curtilage was "considered part of home itself" and thus enjoyed coextensive privacy protections. Oliver v. United States, 466 U.S. at 180.

"Conversely, [since] the common law implie[d] . . . that no expectation of privacy legitimately attache[d] to open fields," this Court reasoned that entering such fields without a warrant did not contravene any reasonable expectation of privacy. Id.

Similarly, in United States v. Dunn, because the barn was not located within the protected area of the curtilage, "[i]t follow[ed] that no constitutional violation occurred . . . when the officers crossed over [Dunn's] ranch-style perimeter fence, and over several . . . interior fences" to gain access to the barn and the phenylacetone laboratory it contained. United States v. Dunn, 107 S.Ct. at 1141.

This Court's conclusion in Oliver, Dunn, and earlier in Hester, that

government entries onto land did not contravene Fourth Amendment protections was because the areas entered were merely open fields and not within the curtilage of a home. Manifest in this Court's differentiation of open fields from curtilage is the converse rule--that any government intrusion onto private lands that lay within the curtilage of a home must implicate Fourth Amendment protections. While this is inevitable and readily apparent when actual trespass is at issue, it also is true when the challenged government intrusion is something other than physical invasion of land, since "[t]he existence of a physical trespass is only marginally relevant to the question of whether the Fourth Amendment has been violated . . ." United States v. Karo, 468 U.S. 705, 712-

713 (1984). Indeed, if the heightened privacy protection of the home is to retain any meaning whatsoever, a wide range of governmental conduct fully permissible outside the curtilage walls cannot be tolerated within. And this is true whether the government conduct is physically intrusive or merely violative of the reasonable expectations of privacy in the home as recognized by societal norms. Katz v. United States, 389 U.S. 347 (1967).

In Katz, this Court rejected the teachings of earlier opinions which triggered Fourth Amendment protections only upon actual trespass, holding instead "that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Katz v. United

States, 389 U.S. at 353. By electronically recording Katz' conversation on a public telephone, the government "violated the privacy upon which [Katz] justifiably relied." Id. Recording the conversation without a warrant constituted a search and seizure within the meaning of, and prohibited by, the Fourth Amendment, even though no physical invasion of a protected space had occurred. Id. After Katz, the relevant inquiry in determining the constitutionality of any search has been whether a person "exhibited an actual (subjective) expectation of privacy," and "one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. at 361 (Harlan J., concurring); United States v. Knotts, 460 U.S. 276, 281 (1983).

Riley's expectation that the curtilage around his home--including his greenhouse--would be free from government inspection was completely reasonable. His constitutionally protected expectation of privacy might have been greatly diminished had his greenhouse been located in some distant open field; protecting the interior of so isolated a greenhouse might require extraordinary measures. But similar measures can not be necessary to maintain privacy in a greenhouse not twenty feet from a home, where the most diligent attempts of a non-airborne, curious police officer cannot achieve even a glimpse of the roof.

In short, Riley did all that society would reasonably expect by shielding his greenhouse sufficiently to preclude

curious passersby from viewing its contents. Indeed, as the trial court found, Mr. Riley exhibited his expectation by deliberately using trees, shrubbery, and corrugated roofing to enhance the privacy in his greenhouse.

Unlike the citizens of some futuristic, Orwellian society, Americans need not construct "light-tight, air-proof box[es]" around themselves, their homes, or activities within the curtilage of their homes "to preserve a modicum of privacy." Lorenzena v. Superior Court, 9 Cal.3d 626, 637, 511 P.2d 33, 41, 108 Cal.Rptr. 585, 593 (1973). To the contrary, within the heightened protections of the home and its curtilage, a person need not guard against all possible surveillance from any vantage point or of any type in order

for subjective privacy expectations to meet societal standards of reasonableness, but need only erect barriers sufficient to preclude the view of reasonably curious users of the general public thoroughfares.

II.

POSITIONING A HELICOPTER DIRECTLY OVER A RESIDENCE AND BUILDINGS WITHIN ITS CURTILAGE INVADES THE HEIGHTENED PRIVACY EXPECTATIONS OF THE HOME AND OVERSTEPS WHAT SOCIETY IS PREPARED TO RECOGNIZE AS REASONABLE

As described by the State of Florida, the helicopter provided the sheriff's deputy with a "platform" in the sky, directly over Riley's yard and greenhouse. Petitioner's Brief on the Merits, pp. 23, 24, 28. As such it allowed a view not generally available to the public either from the ground or, for that matter, from a fixed wing commercial

aircraft traveling through the sky. That "platform," which allowed the sheriff's deputy to see what was not visible from any public vantage point, 2/ invaded the privacy of the home and curtilage.

Plainly, society does not expect that the New York City police will position a helicopter outside the bedroom window of a high rise apartment, nor that a Los Angeles Police helicopter will hover over a rooftop skylight affording a direct view of family living quarters. The sheriff's helicopter circling Riley's greenhouse immediately next to his house

2/ As Deputy Gell testified, his efforts to see into the greenhouse from locations outside Riley's property were uniformly unsuccessful. J.A. at 20-21. Moreover, the record is devoid of evidence to support petitioner's suggestion that the interior of the greenhouse would have been visible from aerial view at 1000 feet in a fixed wing aircraft.

at 400 feet or lower 3/ in order to see inside the greenhouse differs only slightly in degree and not at all in kind from these examples. Each is government activity from which citizens rightly expect to be free. Such platforms in the sky are clear examples of government

3/ At the hearing on the suppression motion Deputy Gell testified that when he first flew over Riley's greenhouse the helicopter was at approximately four hundred feet. J.A. at 26. Then in response to defense counsel's question whether the helicopter ever got lower than four hundred feet, Gell first answered, "I don't know I wasn't paying attention to the height. I was keeping an eye on the trailer and the greenhouse." J.A. at 27. Gell later testified that he was unsure if the helicopter dropped below its initial altitude, adding, "If we dropped a hundred feet, I have no idea." J.A. at 30. He then said, "Well, when we came in, we were a lot higher than when we circled." J.A. at 31.

Gell's complete testimony on the helicopter's altitude reads that the aircraft flew in at 400 feet, which was a higher altitude then when it actually circled over the greenhouse.

conduct that oversteps Fourth Amendment privacy protections in the home by revealing that "'intimate activity associated with the "sanctity of [the home] and the privacies of life."'" U.S. v. Dunn, 107 S.Ct. 1134, 1139, quoting Oliver v. United States, 466 U.S. 170, 180, quoting Boyd v. United States, 116 U.S. at 630. No more than Pasco County sheriffs could, with complete impunity, walk onto Riley's land and look directly into his greenhouse, could they subject his home or a structure within its protected curtilage to surveillance, electronic or otherwise, that so blatantly contravenes societal expectations.

Petitioners make much of plentiful air traffic and argue that society reasonably can expect aircraft to fly

over private land. Petitioner's Brief on the Merits, p. 25. Certainly air flight is a common fact of modern life, and commercial airplanes flying far above the ground are not an unfamiliar sight. However, helicopters are not only far less pervasive but far more intrusive. The day has yet to come when society has become accustomed to carrying out personal lives under the watchful eyes of police helicopters, either hovering noisily above, or swooping down to peer into interior space; and this Court should not hasten that day.

The home and its curtilage are accorded a sort of protective bubble of privacy. Americans need not retreat into basements in order to take advantage of that privacy the framers crafted into the Amendment. Certainly residents cannot

conduct their intimate domestic activity in brazen disregard of police or other citizen's use of public thoroughfares; marijuana growing in a living room window readily apparent to any passerby on the public street or to a mail carrier at the front door is not insulated from government view. Society clearly does not recognize such inattention, even within the dwelling house, as a reasonable assertion of privacy. However, the contents of a greenhouse not visible from public vantage point do not lose the protections of the home-curtilage bubble merely because the police employ extraordinary means to circumvent privacy expectations reasonably asserted. It is in this regard that the facts of Ciraolo differ

markedly from those in the instant matter.

In Ciraolo, this Court declined to hold that a police officer's state of mind when he focused upon suspected marijuana cultivation in a suburban backyard was sufficient to invoke Fourth Amendment protections or to require the suppression of the marijuana plants grown openly in the yard, visible to the passing glance of any member of the commercial flying public. Thus, when the officer, acting upon an anonymous telephone tip, secured a private plane and flew at an altitude of 1000 feet over the house and yard, his observation of 75 marijuana plants, eight to ten feet tall, was held not to be a search necessitating a warrant.

What is clear from Ciraolo is that, even within the privacy of the home and its curtilage, to establish a reasonable expectation of privacy an individual must take some precautions to protect from view items visible from a commercial fixed wing aircraft. Since commercial planes can be expected to fly at altitudes as low as 1000 feet, this Court reasoned that no search occurred when a police officer, like any other member of the flying public, observed from that vantage point the plants growing openly in a backyard. Since it was not objectively reasonable that such large plants grown openly in a yard and visible from public air space to commercial travelers glancing from fixed wing aircraft would not be seen, this Court described as no more than a "hope"

any subjective expectation Ciraolo might have had that the plants would remain hidden from overhead public view.

In this case, unlike Ciraolo, plants were not grown openly; rather they were contained within a greenhouse, which sheltered them completely from passersby on any public thoroughfare. There is no evidence on this record that the plants would have been either visible or identifiable from a fixed wing aircraft at 1000 feet, such as this Court found to constitute no search. 4/

4/ Plainly, as the proponents of the evidence eventually seized, petitioners had the burden to establish an exception to the warrant requirement, a burden they cannot meet by reference to Ciraolo without presenting evidence that the plants could have been seen and identified from a fixed wing aircraft at 1000 feet. Their belated assertions before this Court cannot create a record they failed to make at the trial court suppression motion hearing.

Unlike the fixed wing plane in Ciraolo, the helicopter used to obtain a view into Riley's greenhouse had the unique ability to duck, bob, hover and pirouette in the sky, abilities that have been judicially noticed. People v. Sabo, 185 Cal.App.3d 845, 853, 230 Cal.Rptr. 170, 175 (1986), cert. denied, 107 S.Ct. 2200 (1987). It was also at least 600 feet closer to the ground and to the object of its surveillance than was the airplane used in Ciraolo. Moreover, the F.A.A. regulations grant helicopters virtually limitless sanction to fly at any height, subject only to the caveat that public safety not thereby be endangered. Merely because these regulations would allow a helicopter to fly five feet off the ground, individuals cannot be expected to barricade their

houses against the snooping eye of governmental officials operating helicopters at that height in order to preserve their constitutional right of privacy. 5/

Amicus Airborne Law Enforcement Association, Inc. provides insight into the far ranging use of helicopters by government agents; indeed various police agencies may well be the primary users of

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5/ Someone who resides on property, which due to its location is subject to frequent helicopter overflights in the normal course of events may need to take extra precautions, even within the curtilage of the home, to protect against observations made from helicopters. See, e.g. United States v. Allen, 675 F.2d 1373, (9th Cir. 1980), cert. denied, 454 U.S. 833 (1981). However, the precautions that might be expected of a person who lives next to a Los Angeles freeway would most certainly exceed those of Mr. Riley and other rural dwellers who have no reason to suspect that news gathering or traffic control helicopters will frequent the airspace over their homes.

helicopters. However, the single determinant of societal expectations certainly cannot be the exact governmental conduct the Fourth Amendment is intended to curtail. The police cannot systematically reduce privacy expectations by increasing helicopter flights and conducting them at lower and lower altitudes.

It is in this regard that petitioner's suggestion that this Court adopt a bright line rule that "warrantless naked-eye aerial observation is valid . . . so long as the aircraft is operated where it lawfully may be" (Petitioner's Brief on the Merits, p. 13) ignores the necessary Fourth Amendment inquiries. F.A.A. decisions that helicopters may be safely operated at virtually any altitude provide no basis

for concluding that societal expectations of privacy mirror those safety concerns. To the contrary, although it is highly likely that the bugging device utilized in Katz itself met some government safety specifications, that was completely irrelevant to this Court's Fourth Amendment analysis.

Moreover, the bright line rule petitioner suggests disregards the difference between open fields and curtilage, and would sanction operation of helicopters, without Fourth Amendment implication, identically in locations of heightened and of little inherent privacy. In fact, the concerns reflected in the F.A.A. regulations largely contradict those pertinent to Fourth Amendment; air safety requires planes to fly above 500 feet and yet fixed wing

craft are far less intrusive to privacy than helicopters, which because of their maneuverability pose a much greater threat to privacy but are allowed to fly at lower altitudes under the F.A.A. regulations. Thus, at most, compliance with F.A.A. safety standards provides one possible factor to consider in weighing whether government conduct exceeds societal bounds, but is not a proper basis to conclude that any particular police surveillance flight comports with Fourth Amendment requirements.

Mr. Riley built his greenhouse next to his rural, trailer home, taking care to protect its contents from the view of anyone on the road that ran by his five acre property; his removal, or failure to install, some roofing panels did not expose its interior to public view.

Deputy Gell testified that he could not even see the roof from any location on the roadway. J.A. at 22. Petitioner further agrees that Riley, and his rural Pasco County neighbors, had no reason to anticipate that helicopters would be flown at low altitudes over the area. Petitioner's Brief on the Merits, p. 32. In short the greenhouse contents were obscured from all vantage points--except one arranged by flying a helicopter to the airspace over Riley's home and greenhouse, maneuvering the craft over the opening, and then circling at low altitudes in order to see inside. To sanction this warrantless surveillance of the interior contents of a building located squarely within the protective curtilage of a home would expose all Americans, their homes and effects, to

highly intrusive snooping by government agents, limited only by the agent's ability to safely maneuver a helicopter or some future, even more mobile, aircraft.

CONCLUSION

Since Katz teaches that Fourth Amendment analysis does not lend itself to talismatic--or formulaic--solutions, no bureaucratic determination of the safe operation of a particular aircraft can override constitutional guarantees of privacy in the home. Instead, subjective assertions of privacy must be balanced against the more objective societal expectations of what is reasonable under the circumstances. Riley's greenhouse and the privacy Riley expected it to retain qualify under both Katz prongs.

Not only was the greenhouse, situated

right next to Riley's dwelling thereby imbued with the inhanced privacy incident to his home and its curtilage, but Riley undertook specific precautions to shield its contents from public view; his efforts were successful and in full comport with objective standards of reasonableness. Consistant with this Court's interpretation of the Amendment and the protection it affords, he need not have done more.

For the reasons explained above, the decision of the Florida Supreme Court should be affirmed.

Respectfully submitted,

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DATED: June 30, 1988